No. 957

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IN THE

Supreme Court of the United States

October Term, 1956

UNITED STATES OF AMERICA,

Respondent.

—against—

JOSEPH CIOFFI,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH CIOFFI, *Pro se*

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—against—

JOSEPH CIOFFI,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, defendant-appellant below, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 1, 1957. The petitioner was sentenced to a term of four (4) years on each of two (2) counts to run concurrently and fined the sum of One Thousand ($1,000.00) Dollars.

Opinion Below

The opinion of the Court below (a copy of which is annexed hereto (Appendix, p. 61), has not yet been reported.

Jurisdiction

The Judgment of the Court below was entered on April 1, 1957. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254 (1) and Article III, United States Constitution.

Reasons for Granting Writ

1. Whether the Third Count in the Indictment charging the crime of Conspiracy is fatally defective since it includes as one of the alleged co-conspirators an Agent and Special Employee of the Government and since it relies upon the acts of the said Special Employee of the Government, as acts of a co-conspirator in furtherance of and pursuant to the common object of the alleged Conspiracy?

2. Whether an analysis of the authorities from *Berger* v. *U. S.* (*supra*) to date in the light of *Ex Parte Bain* (*supra*) Amendment V, U. S. Constitution and The Harmless Error Statute, clearly establishes, at least as to the crime of Conspiracy, that the cases and authorities are in utter confusion and conflict and that decisive clarification thereof is imperative for the Bench, Bar and the community?

3. Whether the search and seizure conducted by the Government Agents at the home of the defendant, Cioffi, on June 9, 1956 was antecedent to the subsequent arrest which was predicated upon the property then unlawfully seized and was without search warrant or warrant of arrest violating the provisions of Amendments IV and V of the United States Constitution, thus rendering it imperative upon the Trial Judge to exclude the evidence so obtained?

4. Whether the statements made by Guido Moscatelli to Jackson and admitted into evidence upon the theory that they were acts or statements made in furtherance of a conspiracy cannot properly be regarded as binding upon the defendant, Cioffi?

5. Whether it was error on the part of the Court to preclude examination in full as to the events, including

conversations which transpired at the home of Cioffi and in his presence on June 9, 1956 at 11:30 P.M. at or about the time of his arrest?

6. Whether the spectacle of permitting Jackson to take the stand, an alleged confederate and an alleged co-conspirator and declare in the presence of the jury that he had conceded his guilt to the allegation in the Indictment which charged that he and Cioffi plotted and conspired and agreed to sell and transport drugs, and, in the presence of the jury being ordered to answer and to testify, and in the presence of the jury being confronted with further punishment for refusal to testify was prejudicial to the defendant, Cioffi?

7. Whether the sale, concealment, receiving and facilitating the transportation and sale of a narcotic drug contemplated by the Statute (Sec. 174, Title 21, U. S. C. A.) in accordance with its true intent and construction declared criminal the sale, transportation or facilitating as part of a criminal business or enterprise having a degree of continuity and yielding a financial return of substance, the mere casual or isolated act or acts of an intermediary or acts of procurement such as existed in the case at bar?

8. Whether the failure on the part of the Court to charge and to define for the jury that the sale, concealment, etc., of a narcotic drug contemplated by the Statute (Secs. 173-174, Title 21, U. S. C. A.) declared criminal the sale, etc., as part of a business or as part of an enterprise having some degree of continuity or yielding a return, stake or financial interest, as distinguished from the casual or isolated acts of an intermediary, constituted reversible error?

9. Whether the Trial Court in its charge to the jury submitted and defined for their consideration and determination a crime which was not the subject of the Indictment and a crime which was not before the Court, thus rendering a trial thereon void?

10. Whether the Trial Court charged the Jury, for their consideration and determination, a new and different conspiracy embracing different dates and new and different parties as well as new and different overt acts, not at all as contained and as charged in the Indictment?

11. Whether the Trial Court by its charge permitted the Jury to make findings, pass upon and determine and render judgment upon a new and different conspiracy charged by the Court but not at all contained in the Indictment and not at all the subject of an Indictment by a Grand Jury?

12. Whether the Trial Court by its charge permitted the Jury to find and to render a determination with respect to either one of two conspiracies (one self-created by the Court) as if the proof as to either one would be sufficient to satisfy the allegations in the Indictment, when, in fact, the self-created conspiracy charged was not a part of the Indictment at all?

13. Whether the conduct of the Court, in varying the charge in the middle of the case, as if the said varied charge constituted the crime or conspiracy charged in the Indictment can be declared Harmless Error?

14. Whether the case at bar falls within the permissible zone of secondary or smaller conspiracies fitting within the pattern of the larger or broader conspiracy as prop-

erly charged (*Berger* v. *U. S., infra*), or whether the case at bar fits more properly within the principles enunciated in *U. S.* v. *Kotteakos, infra,* as constituting separate conspiracies, one of which is not at all charged in the Indictment, and is improperly charged by the Trial Court to the Jury and as such is the subject of condemnation by the said Kotteakos case?

15. Whether the practice in the case at bar of permitting an alleged co-conspirator to subsist throughout the Indictment and throughout the trial in the dual phase of both a conspirator and a Government Agent concurrently constituted prejudicial error to the defendant Cioffi?

16. Whether the principles as enunciated in *Berger* v. *U. S.*, 295 U. S. 78, *Teleman* v. *U. S.*, 67 Fed (2) 716 and *Kotteakos* v. *U. S.*, 328 U. S. 750 in the light of the Harmless Error Statute require further and more explicit clarification by this Court for the general benefit and guidance of the Bench and Bar as well as the guidance of prosecuting officers as to the preparation of indictments?

17. Whether the clear and explicit pronouncements as set forth in *Ex Parte Bain*, 121 U. S. 1 as to the redrafting and variance of indictments by the Court and prosecuting officers in violation of Amendment V of the U. S. Constitution have been entirely swept away and rendered obsolete in our present day law as to Conspiracy in the light of the Harmless Error Statute?

18. Whether the practice on the part of the Government in the case at bar of calling a co-defendant and alleged co-conspirator as a witness for the Government after the said co-defendant has pleaded guilty to the Indictment for the specific purpose of parading said fact to the jury, the

Government knowing and having been informed that the said co-defendant has and will refuse to testify constitutes prejudicial error of a nature requiring reversal?

19. Whether the said prejudicial effect of disclosing to the jury the said co-defendant's theretofore plea of guilty applies with equal force and effect as to all of the counts in the Indictment with respect to the defendant, Cioffi?

Statutes Involved

The Statutes, provide as follows:

Title 21, Section 173, U. S. C.:

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, * * *."

Title 21, Section 174, U. S. C.:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000.00 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000.00 and imprisoned not less than five or more than ten years. For

a third or subsequent offense, the offender shall be fined not more than $2,000.00 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted."

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26. U. S. C.

Section 4701(a):

"There shall be imposed an internal revenue tax upon narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale, at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce * * *."

Section 4703:

"The stamps provided in section 4771 (a) (1) for narcotic drugs shall be so affixed to the bottle or other container as to securely seal the stopper, covering or wrapper thereof."

Section 4704:

"It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Title 18, Section 371 United States Code:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

U. S. Constitutional Amendments Involved

Amendment V:

"The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendmen V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor be deprived of life, liberty or property without due process of law; * * *."

The Harmless Error Statute and Rule

Title 28, Section 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to

errors or defects which do not affect the substantial rights of the parties."

Rule 61—Federal Rules of Civil Procedure:

"No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Statement of Facts

The defendant, Joseph Cioffi, was sentenced on the Second and Third Counts of the Indictment to a term of four (4) years on each of said Counts to run concurrently.

The Indictment filed herein contained three (3) counts, which charged in effect and substantially as follows:

First Count

That on or about the 5th day of May, 1956, Joseph Cioffi and Charles Jackson (two of the three defendants named in the Indictment) unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug (10 oz. of heroin) after the said drug had been imported and brought into the United States contrary to law, knowing that the said drug had heretofore been imported into the United States

contrary to law in violation of Title 21, Sections 173 and 174, United States Code.

Second Count

That on or about the 9th day of June, 1956, Joseph Cioffi and Guido Moscatelli (also two of the three defendants named in the Indictment) unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug (10 oz. of heroin) after the said drug had been imported into the United States contrary to law, knowing that the said drug had been brought into the United States contrary to law, in violation of Title 21, Sections 173 and 174, United States Code.

Third Count

That on or about the 5th day of May, 1956 and continuously thereafter up to and including the date of the filing of this Indictment, Joseph Cioffi, Guido Moscatello and Charles Jackson, the defendants named in the Indictment, unlawfully, wilfully and knowingly conspired, confederated and agreed together and with each other in violation of Title 26 (U. S. C. A.) Section 4704 (a):

> "It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs, except in the original stamped package or from the original stamped package, and the absence of appropriate tax paid stamps from narcotic drug shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Section 4701 (U. S. C. A.) refers to the imposition of an Internal Revenue Tax.

Section 4703 (U. S. C. A.) refers to the affixing of stamps to the bottle or container.

Section 4725-c (U. S. C. A.) states that it shall be unlawful for any person who has not registered and paid the special tax to have in his possession or control narcotic drugs and such possession shall be presumptive evidence of a violation of this section.

Section 4771 (a) refers to Stamps and Sections 173 and 174 refer to the crimes as alleged in the First and Second Counts (Title 21, U. S. C. A.).

In substance, the Third Count herein charges the three defendants with having conspired, confederated and agreed from May 5, 1956 to the date of the Indictment, to violate the Narcotics Laws of the United States.

The said Third Count further alleges in substance that it was the aim or purpose of the said conspiracy that the said three defendants named unlawfully, wilfully and knowingly sell, dispense and distribute narcotic drugs which would not be lawfully packaged or stamped as required by Title 26, U. S. C. A.

It was alleged further in said Count that one of the purposes of said conspiracy was for the defendants to have narcotic drugs in their possession and control and that they would receive, conceal, sell and facilitate the sale of same in violation of Sections 173 and 174 (Title 21, U. S. C. A.).

The said Third Count further alleged that in pursuance of the said conspiracy and to further the object thereof, certain overt acts were committed, to wit:

1. That on May 5, 1956, Charles Jackson, defendant, made a telephone call.

2. That on May 5, 1956, Charles Jackson and Joseph Cioffi met at a bar at 118th Street and Paladine Avenue, in New York City.

3. That on June 9, 1956, Charles Jackson made a telephone call.

4. That on June 9, 1956, the three defendants met at the aforesaid bar.

5. That on June 9, 1956, Charles Jackson and Guido Moscatello met at No. 519 East 117th Street, New York City.

In conclusion, it might be stated:

Section 173 (Title 21, U. S. C. A.) refers to and deals with the importation into the United States of prohibited drugs.

Section 174 (*supra*) reads as follows:

> "If any person fraudulently or knowingly imports or brings into the United States * * * contrary to law, or assists in so doing, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug * * * knowing the same to have been imported contrary to law, such person shall be fined not more than $5,000.00 and imprisoned for not more than ten years. Whenever on trial for a violation of this section, the defendant is shown to have had possession of the narcotic drug, such possession shall be deemed to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The aforementioned represents a brief resume of the Indictment and its various counts as well as the overt acts relied upon by the Government in support of the Conspiracy count of the said Indictment.

A brief outline of the testimony and evidence elicited at the trial herein is set forth in the Appellant's Brief (pages 4 to 13) which is made a part of the record herein and is repeated and reiterated in petitioner's brief in support of the instant petition and the same is referred to and incorporated herein by reference as if fully set forth in the instant petition, thus obviating any further repetition of the same.

REASONS FOR GRANTING THE WRIT

POINT I

The Third Count in the Indictment charging the crime of conspiracy is fatally defective and any commitment based thereon is in violation of due process of law, since it includes as one of the alleged co-conspirators an agent and special employee of the Government and since it relies upon the acts of the said special employee of the Government as acts of a co-conspirator in furtherance of and pursuant to the common object of the alleged conspiracy.

As before stated, the Third Count of the Indictment alleges a Conspiracy by and between defendants, Cioffi, Moscatello and Jackson, having its inception on or about May 5, 1956 and continuing thereafter to and including the date of the instant Indictment, which would embrace and include within it the period of June 8th and June 9th, 1956, the said Indictment having been found thereafter.

It may be very readily conceded herein that on May 5, 1956 the Government Agents with the aid of Charles Jackson's brother (Richard Jackson, also a Special Employee of the Government, engaged to entrap his brother, Charles

Jackson, the co-defendant herein, prior to the said Charles Jackson in turn undertaking to act as an agent of the Government to entrap Joseph Cioffi, the petitioner herein) discovered and found Charles Jackson in the sale and distribution of narcotic drugs.

The said Agents did not apprehend the said Charles Jackson on the said May 5, 1956 but permitted him to be at large, apparently hoping, without the aid of the said Charles Jackson, as a Special Employee, to obtain knowledge as to his source of supply.

Unsuccessful in this policy and program, the Government Agents apprehended the said Charles Jackson on June 8, 1956 and, following a conversation with him, immediately put the said Charles Jackson to work as a Special Employee and Agent for the Government.

It would seem at this point that Charles Jackson, based upon his apprehension and new undertaking as a Special Employee of the Government, could no longer be considered as a co-conspirator acting in furtherance of the Conspiracy, but rather as a matter of fact and law was a Government Agent, pure and simple, acting against the so-called and alleged Conspiracy.

That the said Charles Jackson, following his arrest on June 8, 1956, at or about 8 or 9 P.M. and upon his engagement as a Special Employee of the Government and upon his undertaking the said activities did thenceforth become an Agent of the Government (as distinguished from a co-conspirator, even to the extent of receiving immunity for his subsequent activities and did then and there sever and terminate whatever previous relationship existed as a co-conspirator.

See:

Krulewitch v. *U. S.*, 336 U. S. 440;
Lett v. *U. S.*, 15 Fed. (2d) 690;
U. S. v. *Berger*, 62 Fed. (2d) 1009;
Smith v. *U. S.*, 17 Fed. (2d) 723.

It is obvious therefore, that so much of the Indictment herein as charges a Conspiracy by and between Cioffi, Moscatello and Jackson from and after June 8, 1956 (at or about 8 P.M.) and further charges overt acts by Charles Jackson in furtherance of the Conspiracy after the said date and time cannot be sustained for the reason that Jackson could not by law assume the guise at one and the same time of a co-conspirator and a Government Agent.

These facts were known to the Government at the time the instant Indictment was drafted and were known to the Government on June 8, 1956 because the Government itself created the situation and were unknown to the defendant at all times until the same were revealed during the course of the trial at which time the defendant herein promptly and repeatedly made motions assailing not only the practice and procedure, but also the prejudicial effect inflicted upon the defendant as a matter of substantive law and right.

With the knowledge which the Government had in its possession at the time the instant Indictment was drawn, proper pleadings would have required the Government to plead as follows:

(1) That heretofore and on or about May 5, 1956 Cioffi, Moscatello and Jackson conspired, confederated and agreed from the said 5th day of May down to the 8th day of June, 1956.

(2) That on or about the 8th day of June, 1956 the aforesaid Jackson severed and terminated his relationship as a co-conspirator in said Conspiracy.

(3) That from and after the said 8th day of June, 1956 down to the date of the Indictment herein, Cioffi and Moscatello confederated, conspired and agreed together and in furtherance thereof the said Cioffi and Moscatello committed the following overt acts, etc.

The Court in the case at bar was well aware that from and after June 8, 1956 the name of Jackson, had no place in the pleadings as a co-conspirator and well knew that Jackson on June 8, 1956 became a Government Agent and could no longer be classified as a co-conspirator.

The Court, realizing the fatal defect in the Indictment, and, realizing the variance in the proof, did not seek to amend the Indictment, nor to entertain a motion to conform the pleadings to the proof (whether it could or not is highly debatable) but proceeded to attempt to correct the situation in the following way:

(1) Realizing that Jackson should have been eliminated from the Indictment and, with Jackson having already pleaded guilty, the Court, on motion dismissed the First Count of the Indictment (the substantive Count of May 5th—where Jackson was the prime factor and Moscatello was not even mentioned at all) thus, beginning the case anew as of June 8, 1956 with Jackson as an Agent and Moscatello and Cioffi as co-conspirators of a new conspiracy.

(The aforesaid is not at all akin to a mere change in the personnel of the members of an alleged Conspiracy with

some members dropping out and new members being added —the vice here is that the Indictment charged a Conspiracy embracing May 5th to the date of the Indictment with Jackson as an alleged co-conspirator during all of the said time and performing alleged overt acts, upon which the Government relied in its Indictment—when all the while the said Jackson was not a co-conspirator at all, but a Government Agent and this was known to the Government and nevertheless the Government drafted the Indictment and it was this Indictment and the Conspiracy as so drafted and as so found by the Grand Jury that the defendant, Cioffi, was called upon to answer—not some other Indictment formulated in the mind of the Trial Court with new and different dates, new and different parties and new and different overt acts—all of which were not the subject of the Indictment by the Grand Jury.)

(2) At page 752 of its charge, the Court did not charge the Conspiracy set forth in the Indictment (Cioffi, Moscatello and Jackson) but charged a new and different Conspiracy, not set forth in the Indictment (between Cioffi and Moscatello) as follows:

> "In this case you heard the evidence, and you must take it all into account and determine on this count of the indictment, the conspiracy count, whether you can conclude from all the evidence, beyond a reasonable doubt, (1) that there was a conspiracy between *Cioffi and Moscatello* to commit an offense against the United States; (2) that the defendant Cioffi knowingly associated himself with the Conspiracy; and (3) that either *Cioffi* or *Moscatello,* while a party to the conspiracy, committed an overt act in furtherance of the conspiracy. In other words, was the meeting between Cioffi and Mosca-

> tello on the 9th day of June, 1956, at the bar, an overt act pursuant to a conspiracy to which they were parties?"

It is clear from the above that the Court charged the Jury with reference to a conspiracy not contained and different from the conspiracy charged in the Indictment.

The Grand Jury charged a conspiracy embracing Cioffi, Moscatello and Jackson over a period embracing May 5, 1956 to and including the date of the Indictment.

> "Further and in pursuance of the said conspiracy and to effect the objects thereof, on or about the 9th day of June, 1956 in the Southern District of New York, Charles Jackson, Joseph Cioffi and Guido Moscatello, defendants, met at a bar at 118th Street and Paladino Avenue, New York City."

The Court, at page 752, in the case at bar, however, charged the Jury as to a conspiracy between Cioffi and Moscatello omitting Jackson and further charged the Jury as to an overt act between Cioffi and Moscatello, omitting again Jackson. (All of this fitted very nicely into the facts being elicited and into the portrayal sought to be developed by the Court—but it did not at all fit into the language and allegations in the Indictment.)

There was no overt act charged in the Indictment such as the Trial Court in the case at bar charged the Jury at page 752 of the minutes.

The defendant, Cioffi, stood before the Court to answer to an Indictment as charged and as found by the *Grand Jury* as distinguished from the Court.

The defendant, Cioffi, herein was tried and found guilty upon a charge other than that contained in the Indictment and other than that as presented and as found by the Grand Jury.

Nor can it be contended herein that the Court and the Prosecution were not fully cognizant of the difficulty with the fatally defective Indictment in the case at bar.

In this connection at page 611 (Vol. III, Minutes) even the United States Attorney handling the prosecution conceded to the Trial Judge that on June 9th, Jackson was no longer a conspirator.

The Court then propounded to the said Prosecutor, the following questions:

> "What proof is there that Moscatello was a conspirator at any time prior to June 9th?"

The Court at page 613 of the Minutes (Vol. III) referred to the evidence as follows:

> "The Court: This talks about three conspirators, one of whom no longer is a conspirator on June 9th and the other of whom as to whom there is no evidence prior to June 9. How then, is that a conspiracy as far as June 9th is concerned?
>
> Mr. Monroe: Your point is that the evidence shows two separate conspiracies, one between Jackson and the defendant and one between Moscatello and the defendant.
>
> The Court: I am not so much concerned with the two separate conspiracies as the fact that you have named three conspirators over a long period of time, and one obviously was not a conspirator at the time of the events of June 9th and as to the other one

there is no evidence he was a party to any conspiracy prior to that date.

Mr. Monroe: That is true.

The Court: You have the problem, then, as to whether what you have alleged as a conspiracy is anything more than merely the commission of the substantive crime on June 9th."

And at page 617, the Court stated as follows:

"Then when you come to the third count, I have the question as to whether there is any proof of a conspiracy * * *."

In the light of the aforementioned state of mind as expressed by the Court, as well as in the light of the facts as alleged in the Indictment, an analysis of the charge of the Court to the Jury becomes imperative.

At page 731 of the Court's charge to the Jury, the Court stated:

"The case must be decided within the scope of the charges made against the defendant as contained in the indictment. I shall hereafter discuss in detail the indictment and the essential elements of proof necessary to sustain a conviction under the two counts of the indictment which I will submit to you."

At page 744 of the said charge, the Court stated:

"We now come to the third count of the indictment, which is the other count I will submit to you. This is what is known as a conspiracy count. It alleges that from the 5th of May, 1956 up to the filing of the indictment, the defendant Cioffi, together with Guido Moscatello and Charles Jackson combined and conspired to violate laws relating to the sale of narcotics."

and at page 746:

> "Now, although this count of the indictment alleges that Charles Jackson was one of the conspirators, the evidence shows that he was arrested on June 8th. After he was arrested he obviously was no longer a party to the conspiracy and, therefore, you may not take into account any statement of Charles Jackson after June 8th in determining whether this defendant was or was not a party to the alleged conspiracy, *or in fact, whether there was a conspiracy after this date.*"

The Court then, at page 748 in its charge and, in referring to the subject of an overt act in the Indictment, stated:

> "The overt act in the indictment with reference to the defendants Cioffi and Moscatello to which I draw your attention is this:
>
> That further in pursuance of said conspiracy and to effect the objects thereof on or about the 9th day of June, 1956 in the Southern District of New York Charles Jackson, Joseph Cioffi and Guido Moscatello, defendants, met at a bar at 118th Street, and Paladino Avenue, New York City."

At page 752 of the charge, however, the Court omits any reference to Jackson and to the conspiracy as charged in the Indictment and proceeded to charge the jury as though the Indictment was framed in conspiracy only against Cioffi and Moscatello and that the said conspiracy had its inception on June 9th and that the overt act as charged in the Indictment contained only the names of Cioffi and Moscatello, and as if it did not include Jackson. At page 752:

> "In this case you heard the evidence, and you must take it all into account and determine on this

> count of the indictment, the conspiracy count, whether you can conclude from all the evidence beyond a reasonable doubt (1) that there was a conspiracy between *Cioffi and Moscatello* * * * (2) that the defendant Cioffi knowingly associated himself with *this* conspiracy; and (3) that either Cioffi and Moscatello while a party to *the* conspiracy, committed an *overt* act in furtherance of *the* conspiracy." (Italics mine.)

It is obvious from the above that the Court has charged the jury as to a conspiracy that is not contained in the Indictment at all.

It is obvious further that the Court, in its charge, changed the parties to the conspiracy, changed the dates and changed the overt acts—different and distinct from those alleged in the Indictment.

The case at bar involves the conviction for a crime that is not contained in the Indictment.

Article V of the Amendments to the United States Constitution provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

In *Ex Parte Bain*, 121 U. S. 1, it was held that the said provision is jurisdictional and no Court of the United States has authority to try a prisoner without indictment or presentment in such cases.

It was further held (*Ex Parte Bain, supra*) that when this Indictment is filed with the Court no change can be made in the body of the Indictment by order of the Court, or by the prosecuting attorney without a resubmission to

the Grand Jury, and the fact that the Court may deem the change immaterial by striking out words, makes no difference.

The Indictment, as thus changed, is no longer the Indictment of the Grand Jury which presented it.

It is the uniform ruling of the American Courts, except where Statutes prescribe a different rule, and it is the imperative requirement of the provision of the Constitution above recited, which would be of little avail if an indictment once found can be changed by the presenting officer with consent of the Court to conform to their views of the necessity of the case.

Upon an indictment so changed the Court can proceed no further. There is nothing which the prisoner can be held to answer. A trial on such indictment is void. There is nothing to try.

See also, *People* v. *Miles*, 289 N. Y. 300; *Kotteakos* v. *U. S.*, 328 U. S. 750; *Berger* v. *U. S.*, 295 U. S. 78.

POINT II

An analysis of the authorities from *Berger* v. *U. S. (supra)* to date in the light of *Ex Parte Bain (supra)*, Amendment V. U. S. Constitution and the Harmless Error Statute, clearly establishes, at least as to the crime of conspiracy, that the cases and authorities are in utter confusion and conflict and that decisive clarification thereof is imperative for the bench, bar and the community.

As a preliminary statement with respect to the above, the petitioner desires to accentuate that the one fundamental fact in the case at bar to be remembered is that the Government has alleged Jackson to be a co-conspirator throughout the entire overall period (from May 5, 1956 down to the date of the Indictment) when, it is established as a matter of fact and it is conceded in the record both by the Court and by the Government, that on June 8, 1956 at or about 8 or 9 P.M. the said Jackson was apprehended and became a Special Employee and Special Agent of the Government, thus severing Jackson from the conspiracy as alleged and terminating his relationship or characteristic as a co-conspirator.

This phase of the situation is of vital importance because, with the first count having been dismissed by the Court (the said First Count having to do with Jackson and Cioffi from May 5, 1956 down to the moment of Jackson's arrest), then the period from and after the arrest of the said Jackson (June 8th, at or about 8 P.M. to and including June 9th and the early morning of June 10th) to the taking of Cioffi into custody, the entire Government's case rests upon a period of time when Jackson was not a co-conspirator at

all, but an Agent of the Government, and yet the Conspiracy Count in the Indictment continues to declare and to plead said Jackson throughout as a co-conspirator and there is no other conspiracy charged in the Indictment, although, as heretofore stated, a new and different conspiracy involving different parties was charged to the jury.

The aforesaid state of facts is unique and so far as your petitioner has been able to determine, neither *Berger v. U. S.* (*supra*), nor *Kotteakos* v. *U. S.* (*supra*), has presented or resolved the precise situation, although in principle the question of overlapping and general or secondary conspiracies have been discussed in the light of the Harmless Error Statute.

(A discussion of the crime of Conspiracy and its nature of being *sui generis* is contained in Defendant-Appellant's Brief in the United States Court of Appeals at pages 28 to 32 thereof and the same is incorporated herein by reference thereto.)

In the case of *Berger* v. *U. S.*, 295 U. S. 78, the petitioner therein was indicted in a Federal District Court, charged with having conspired with seven other persons named in the indictment to utter counterfeit notes; the indictment contained eight (8) additional counts alleging substantive offenses. Among the persons named in the indictment were Berger, Rice and Jones. Rice and Jones were convicted on two of the substantive counts and on the conspiracy count. Berger was convicted on the conspiracy count only. Katz pleaded guilty to the conspiracy count and testified for the Government. The evidence tended to establish not a single conspiracy as charged but two conspiracies—one between Rice and Katz, and another between Berger, Jones and

Katz. The only connecting link between the two was that Katz was in both conspiracies and the same counterfeit money had to do with both. There was no evidence that Berger was a party to the conspiracy between Rice and Katz.

Berger moved to dismiss the conspiracy count on the ground that the evidence was insufficient to support the charge.

The Court of Appeals affirmed the Judgment holding that while there was a variance between the allegations of the conspiracy and the proof, that the same was not prejudicial.

The case came to the Supreme Court of the United States because of a conflict with other Circuit Courts of Appeals as to the effect of the alleged variance.

The Court, in its opinion, at page 81, stated as follows:

> "It is settled by the great weight of authority that although an indictment charges a conspiracy involving several persons and the proof establishes the conspiracy against some of them only, the variance is not material."

(NOTE: The aforementioned, of course, is conceded to be the law.)

> "But several circuit courts of appeals have held that if, the indictment charges a single conspiracy and the effect of the proof is to split the conspiracy into two, the variance is fatal. Thus it is said in Telman v. U. S., 67 Fed. (2d) 716, 718: 'Where one large conspiracy is charged, proof of different and disconnected smaller ones will not sustain a conviction * * *.' This view, however, ignores the question

> of *materiality* and should be so qualified as to make the result of the variance depend upon whether it has *substantially injured the defendant.*" (Italics mine.)

In the *Berger* v. *U. S.* case at page 81, the Court stated:

> "In the present case, the objection is not that the allegations of the indictment do not describe the conspiracy of which petitioner was convicted, but, in effect, it is that the proof includes more. If the proof had been confined to that conspiracy, the variance, as we have seen, would not have been fatal. • • • "

In this *Berger* v. *U. S.* case the proof elicited was embraced in the allegations in the Conspiracy Count and was sufficient to be contained within it.

In short, the greater (properly alleged in a proper indictment) will be regarded as inclusive of all of its segments or parts and the fact that these parts might constitute dual conspiracies, subordinate to or within the framework of the main fabric, will not constitute a variance unless the defendant can establish surprise or prejudice.

In the *Berger* v. *U. S.* case all of the defendants were co-conspirators within the major framework of the indictment and the proof so established.

In the case at bar, Jackson as a co-conspirator (and as indicted) was a stranger to the Conspiracy alleged after June 8th and had no place at all in the Indictment and this was known to the Government.

In the case at bar, it is not a case of proving too much, all of which fits within the whole—it is a case of proving a Conspiracy as against Cioffi and Moscatelli which is not

at all alleged in the Indictment and cannot be regarded as secondary, subordinate or as part and parcel of the main charge—it is adverse, inconsistent with and cannot at all co-exist with the main charge or the main fabric as alleged in the Indictment.

Is it possible in this situation to say that the petitioner, Cioffi, was not surprised when he was confronted with a conspiracy, recently emanating from the Lower Court's brain and not at all a part of the Indictment which he came prepared to meet?

Can we say that because the facts may be related somewhat that therefore there is no surprise?

If so, then mere reference to a transaction generally would supplant allegations in an Indictment.

(The petitioner herein may be able to understand and possibly to agree, that if you indict six (6) people in a single general conspiracy and if your proof establishes two (2) conspiracies (of a subordinate nature to the general one) and three (of the six) are proved to be involved in each of the subordinate conspiracies—and a conviction is had—the separate defendants may not complain in the absence of prejudice.)

The aforementioned (although alarming enough in the light of *Ex parte Bain, supra*) may nevertheless be justified as follows:

(1) The General Conspiracy Count includes all six (6) defendants and they are all proper defendants—not Special Employees of the Government roaming through the conspiracy—and named in the indictment as co-defendants and co-conspirators.

(2) Each of the subordinate conspiracies as proved relate to and are connected with the main or general conspiracy and fit within the language and the framework thereof, as to time, places, parties and overt acts as alleged.

(3) Each of the three defendants in each conspiracy are found to be conspirators together as to their respective subordinate conspiracy.

(4) The Conspiracy as alleged in the Indictment (the General Conspiracy) is a valid count naming valid conspirators not Government Agents.

(5) Each of the secondary or subordinate conspiracies fits within the framework of the main Count and each of the conspirators named is a conspirator—not a Government Agent.

(6) The Conspiracies found from the proof are valid inferences of fact allowing the conclusion of an Agreement between conspirators in fact as alleged and as set forth in the Indictment.

(NOTE: In the case at bar the Conspiracy or original agreement as alleged is fictitious, a sham and a fraud since Jackson was not a *bona fide* conspirator, but was a Federal Agent.

The agreement or conspiracy alleged is a sham and is defective in its general framework and it cannot be bisected or subdivided or changed to give substance and solidarity where there is none.)

The purpose behind the enactment of the Harmless Error Statute (Title 28, Section 2111, formerly Sec. 269 of the Judicial Code, as amended, 28 U. S. C. 391), to wit:

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or

> criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors defects or exceptions which do not affect the substantial rights of the parties."

as well as the evils sought to be remedied are sufficiently explained in the opinion of the Court in *U. S.* v. *Kotteakos*, 328 U. S. 750, 757 *et seq.*

Beginning at page 758 of the said opinion, it is stated as follows:

> "The salutary policy embodied in Sec. 269 was adopted by the Congress in 1919 * * * after long agitation * * *. But anyone familiar with it knows that Sec. 269 and similar state legislation grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was as one trial judge put it after Sec. 269 had become law, that courts of review 'tower above the trials of criminal cases as impregnable citadels of technicality'. So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained.

And at page 760, it is stated:

> "The effort at revision therefore took the form of the esesntially simple command of Sec. 269. It comes down on its face to a very plain admonition: 'Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects.' * * * But that this burden does not extend to all errors appears from the statement which follows immediately. 'The proposed legislation affects only technical er-

> rors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it.' * * *.
>
> Easier was the command to make than it has been always to observe."

In the case at bar we have several factors compounded together into a conglomerate unit, all of which not only confuse and surprise the petitioner-defendant, but by misstatement and misallegation, divert and distort the true issues, which may have been in the background of the Government's brain as to what it would have liked to have had alleged and all of which have enured to the detriment and prejudice of the said defendant.

We have presented in the case at bar all of the following:

1. That elastic, sprawling and pervasive offense of Conspiracy. (Cf. *Krulewitch* v. *U. S.*, 336 U. S. 440 at 445.)

2. An Indictment which in its allegations knowingly sets forth the wrong parties, the wrong period of time and the wrong overt acts.

3. A Trial upon which the evidence elicited seeks to establish a Conspiracy different from the one alleged in the Indictment having glaring and flagrant dissimilarities but having some remote semblance to the facts.

4. A Charge by the Court to the Jury which mentions the charge in the Indictment, but thereafter proceeds to charge the Jury and to accentuate and to expound upon an entirely different Conspiracy, as if the finding of the latter would justify a conviction for the crime charged in the

Indictment. (This is tantamount to a dual charge based upon dual conspiracies and dual doubletalk the Jury—which obviously no lay person could be expected to fathom and to disentangle.)

5. The Haven of Refuge of the Harmless Error Statute seeking to declare a jurisdictional defect amounting to the usurpation of the function of the Grand Jury as a mere *technical* error.

6. The usage and employment of the specious reasoning, to wit, that if the Government indict six (6) for Conspiracy and the proof establishes a conspiracy only as to five (5), the conviction is valid, or the further specious argument that the personnel of a Conspiracy is subject to change—all of these are predicated upon a valid Indictment and valid allegations as to the parties alleged to be conspirators within the Conspiracy charged in the Indictment.

In the case at bar, even if Jackson dropped out of the Conspiracy in fact, he (Jackson) did not drop out of the Indictment as alleged.

If Jackson dropped out in fact as a conspirator, what Indictment remained for the petitioner to Answer?

There was nothing remaining, except for the Court and the Prosecutor in the middle of the trial to create a new Indictment to suit the evidence as it was being differently constructed.

In the face of all of the aforesaid, the defendant-appellant sought to enlist in his favor the principles enunciated in *Kotteakos* v. *U. S., supra.*

At page 767 of the opinion in the said *Kotteakos* case (almost precisely in point with the situation presented in the case at bar) it was stated:

> "One difficulty with this is that the trial court itself was confused in the charge which it gave to guide the jury in deliberation. The Court instructed:
>
> 'The indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy the Government would have to prove, and you would have to find, that each of the defendants was a member of that conspiracy. You cannot divide it up. It is one conspiracy * * *'.
>
> * * * The Jury could not possibly have found upon the evidence, that there was only one conspiracy. * * *"

And at page 769 of the opinion:

> "But in the face of the misdirection and in the circumstances of this case, we cannot assume that the lay triers of fact were so well informed upon the law or that they disregarded the permission expressly given to ignore that vital difference."

The same confusion and vice as existed in the charge in the *Kotteakos* case likewise existed *a fortiori* in the case at bar, and the said erroneous charge was declared and held to constitute prejudice even despite the Harmless Error Statute.

That the Doctrine of the cases of *Berger* v. *U. S.* and *Kotteakos* v. *U. S.* in the light of the Harmless Error Statute and in the light of *Ex Parte Bain, supra*, require further elucidation and clarification for the Bench and Bar as well as the community in general is patent.

A significant statement by Judge Learned Hand, only as recently as March 19, 1957 in the case of *U. S. v. Reinz, et al.* (published in the New York Law Journal, 1st page, April 25, 1957), regarding *U. S.* v. *Kotteakos* appears as follows indicating that the Courts are in confusion and concern as to the exact principles and limitations of the said *Kotteakos* case. It is stated:

> "The doctrine of Kotteakos v. U. S. (supra) and Blumenthal v. U. S. (supra) does not extend to the conviction of the other four appellants. *We are not indeed altogether sure that we understand its exact limits,* as it was modified by the second decision. Certainly, there is no 'variance' between the charge in the indictment and the convictions that we are affirming. (Italics mine.)

POINT III

The search and seizure conducted by the Government Agents at the home of the defendant, Cioffi, on June 9, 1956 was antecedent to the subsequent arrest which was predicated upon the property then unlawfully seized and was without search warrant or warrant of arrest violating the provisions of Amendments IV and V of the United States Constitution, thus rendering it imperative upon the Trial Judge to exclude the evidence so obtained.

In the case at bar the defendant, Cioffi, contended that no arrest at all was made until long after the Agents had arrived at his home and after they had conducted their unlawful search and seizure and that it was not until they had finally culminated their search by the discovery of the $50. Dollar bill tallying with their sheets that an arrest was made.

It is not significant at this point to inquire as to what happened to the balance of the $1500.00, to wit, $1450.00 which concededly was never recovered, found or even inquired about?

The Agents contended, in effect, that they walked into the apartment, disclosed their credentials, made an arrest, immediately found the $50 Dollar bill, brought up by Moscatelli (apparently to dispute the story of Cioffi), abandoned this, and walked out of the apartment with Cioffi, without even a suggestion from anyone as to what happened to the rest of the money.

It must be obvious to the Court that the Agents ransacked the house from top to bottom and then finally discovered the $50. Dollar bill.

It must be obvious further that further search would be futile and that the only explanation of the presence of the $50. Dollar bill was Cioffi's and that in order to refute the same they brought Moscatelli to Cioffi's house handcuffed.

It must be further obvious to the Court that Moscatelli's story must have coincided with Cioffi's, to wit, that he paid back Cioffi the $50. loan with a $50. bill from the roll of bills obtained from Jackson and that Cioffi received nothing else.

Obviously this was the reason for no further search for $1450. (because they had the man who received that money) and also the reason for the failure to reveal what took place in the apartment upon the arrival of Moscatelli.

In any event, the Court decided the issues on the collateral hearing adverse to the defendant and found as a

matter of law that the arrest preceded the search thus rendering the search lawful.

At this point in the trial the Court misunderstood its function.

It was not for the Court to decide the issue of fact as to whether the arrest preceded the search; it was for the Court to determine on the facts whether the evidence was admissible and to leave to the jury to decide ultimately as the final arbiter whether the arrest preceded the search or vice versa and then, finally to instruct the Jury, based upon its finding whether to give effect or to disregard the evidence obtained from the search.

As to the Court, this was only a collateral hearing as a matter of law to determine:

(1) Whether the evidence was such that a Jury would be justified in determining beyond a reasonable doubt that the arrest preceded the search.

(2) If the Court determined as a matter of law that a Jury would be so justified in so finding, then and at that point the Court should have declared merely that it regarded the evidence as sufficiently strong factually to be passed on to the Jury for its determination as to when the arrest was made and, upon proper instruction to the Jury to give effect to the property seized or to exclude the same, from its consideration, contingent upon its determination of the fact.

(3) In the case at bar the Trial Judge for all purposes presumed to determine and to adjudicate the fact that the arrest antedated the seizure, when as a matter of law, the

Court's sole function was to determine whether this issue should be given to the Jury or whether the $50. Dollar bill should have been excluded altogether.

(4) The Court went further in error by suggesting that the Agents could have made their arrest based upon reasonable cause or reasonable probability that the defendant had committed a crime; this entirely begs the issue, however, as it is not what the officers could have done, if they had acted otherwise, it is what they did that is determinative of whether they could search. Of course, after they unlawfully seized the $50. bill and discovered the same, their grounds to search obviously became more reasonable.

It is urged herein that the arrest was predicated upon the seizure and not the seizure upon the arrest.

Cf. *Johnson* v. *U. S.*, 334 U. S. 10.

That, in addition to all of the above, the Trial Court was grossly in error, even if it was aware of its true function, on the facts since no Jury would have been justified in finding beyond a reasonable doubt that the arrest preceded the seizure.

It may be argued that all of these are factual arguments which have been passed upon by the Jury to which one can only respond that the facts herein are so permeated with reasonable doubt that as a matter of law they never should have been submitted to the Jury, and most certainly never should have been adjudicated by the Court, and even if there had been a basis to submit the same to the Jury, it should have been carefully delineated and defined.

See:

Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, by Edmund M. Morgan, 43 Harvard Law Review, 165-191.

See also:

United States v. *Carignan*, 342 U. S. 36 at 38 and 39.

In this cited case, the second issue presented to the Court at page 38 as follows:

> "Second. Further error, it is said, followed from a failure of the Trial Court to submit to the Jury, as a question of fact, the voluntary or involuntary character of the confession."

In this cited case the Trial Court after a collateral hearing in the absence of the jury had found that the confession was voluntary and therefore ruled the same admissible. (As in the instant case.)

However, it is urged herein that the finding, as it was therein (in the cited case) that this finding by the Court that the confession was voluntary is not conclusive, but is only a finding for the limited purpose of determining whether the jury should hear the confession, and, if the Court should so find, then it is the function of the Court to submit to the jury the same question of fact (the voluntariness of the confession) upon appropriate instructions to give effect to the confession only upon the condition that they (the jury) should find that the said confession vountary.

This foregoing principle is enunciated clearly in the opinion of Mr. Justice Reed in *U. S.* v. *Carignan* (*supra*, at p. 39) stating with respect to the aforesaid Issue No. 2 as follows:

> "The evidence on the new trial will determine the necessity for the character of instructions to the jury on the weight to be accorded the confession, if it is admitted in evidence. CF. United States v. Lustig, 163 Fed. (2d) 85, 88-89; McNabb v. U. S., 318 U. S. 332, 338, note 5."

In short, even if the confession is foolproof, its voluntariness must first be found by the jury upon clear instructions by the Court before the confession can have any probative value.

In the case at bar, the factual issue as to whether the arrest preceded the search, thus rendering the $50. bill admissible, never even reached the jury and was never submitted to it.

In the case at bar, the Court made a finding that the arrest preceded the search and for all purposes for the rest of the entire case that issue was adjudicated finally by the Court.

It is submitted that the finding of fact made by the Court herein was only a limited finding and that thereafter the Court had a duty to explain and to charge the jury that, as a condition precedent to giving any credence to the $50. bill, it (the jury) must find first that the arrest preceded the search, otherwise it was incumbent upon the jury to dispel from their minds any considerations at all with respect to the said $50. bill.

It is interesting also to analyze the basis for the Court's finding that the arrest preceded the search, which is stated at page 89 of the Minutes of the Collateral Hearing:

> "I think the defendant on that issue is obviously an interested witness * * * ".

Every defendant in a criminal case has a stake in the result, but that does not necessarily mean that his testimony should be disbelieved because he is a defendant.

Certainly, the yardstick employed by the Court in making its finding could not be declared synonymous with the measure or yardstick to be employed by a juror in seeking to determine whether a fact has been established to his satisfaction beyond a reasonable doubt.

In addition, to the aforementioned finding of fact by the Court, at pages 90 and 91 of the said Minutes, the Court seeks further to justify the admissibility in evidence of the $50. bill on the theory that the Agents had reasonable or probable cause to believe that a crime had been committed by Cioffi and therefore no warrant of arrest was necessary.

The aforementioned is conceded but the validity of an arrest does not warrant an unlawful search, and the fact that the Agents may have been justified in making an arrest (if they made one) does not justify an unlawful search (if no arrest was made, even if they might have.)

Agnello v. *U. S.*, 269 U. S. 20;
Weeks v. *U. S.*, 232 U. S. 382;
Harris v. *U. S.*, 331 U. S. 145;
Trupiano v. *U. S.*, 334 U. S. 699;
Rabinowitz v. *U. S.*, 339 U. S. 56;
Johnson v. *U. S.*, 334 U. S. 10.

In the case at bar these facts are flagrantly apparent:

(1) The Agents had defendant, Cioffi, under surveillance and were attempting to entrap him into a crime from and after May 5, 1956 prior to the search and the subsequent arrest.

(2) The Agents herein did not procure either a warrant of arrest or a search warrant.

(3) The Agents proceeded to the private home of Cioffi and invaded the same cloaked only with the authority they possessed as officers and no more.

(4) No crime was being committed in the discernible presence of the Agents at the place of search.

(5) There was no crime of a continuing nature being committed in their discernible presence.

(6) Any suggestion of "Fresh Pursuit" would be sheer nonsense.

(7) The home of the defendant, Cioffi, was private and not public.

(8) From and after the entry of the Agents, they proceeded to search as gathered from the facts—to arrest and thereafter to search.

(9) The Agents proceeded to explore, rummage and ransack Cioffi's private home and then his person and, as a result of same, came a cross a fifty ($50.) dollar bill, among other things.

(10) Following all of the aforementioned and following the search the Agents made the arrest charging a crime of which the $50. bill forms a basic part and establishes the

connecting link by and between Cioffi and a part of the proceeds of the sale.

It is clear and unmistakable that the arrest made herein was an incident to and followed the seizure of the $50. bill by means of the unlawful search.

In conclusion on this point it seems like such an utter waste of time and effort on the part of jurists, such as Frankfurter, *J.*, Jackson, *J.*, *et al.*, to define, explicitly with meticulous and delicate care the manner and the history by which the rights enumerated in the IVth Amendment of the Constitution came to be embraced therein, by way of the Magna Charta, Declaration of Independence, Bill of Rights, etc., involving the subject of the unlawful invasion and search of one's home "from cellar to garret" without warrant, and to spell out with judicial delicacy the rights of an officer attendant upon a lawful arrest, when all of these concepts, principles and rights can be made short shrift of by a hasty, rough and brash determination of the issues upon which these rights are based, such as took place in the case at bar.

If these Agents, having the time and opportunity, did not pause in their operations to secure some sort of warrant of arrest or search, can it be said that they were mindful of any rights residing in the defendant or that there might be some sort of sanctuary in the home?

If these Agents were bent upon finding a connecting piece of evidence, sufficient to link Cioffi to the crime, could it not fairly be argued that they invaded Cioffi's home to find the proceeds and based upon the discovery, then to make an arrest which would insure conviction?

If the Agents had reasonable and probable cause to make the arrest (irrespective of the $50. bill) then why did they defer an arrest of Cioffi on May 5th, or on June 9th after 3:30 P. M. when (as they claim) he was in possession of the entire $1500.00 roll of bills?

If the Agents did invade and did unlawfully search and thereafter made an arrest, is it reasonable to suppose that the facts would be changed to suit the law?

Can it be said that the Agents floundering around in their own stupidity did not have an interest in correcting their errors?

Upon all of these issues, would it not be incumbent upon a Court to be cautious, delicate and circumspect, so as to ferret out the precise activities which earmarked an action as lawful or unlawful?

POINT IV

The statements made by Guido Moscatelli to Jackson and admitted into evidence upon the theory that they were acts or statements made in furtherance of a conspiracy cannot properly be regarded as binding upon the defendant, Cioffi.

Agent Latta, upon direct examination, at page 158 of the minutes (Vol. I) testified as follows:

> "I gave Charles Jackson his drink, and I sat down at the table across from them. At this time Tommy told Jackson that everything would be the same as before and that he was handling things for Joe Cioffi."

In the above conversation we have Tommy (Guido Moscatelli) telling Jackson (a co-conspirator in the indictment, but at this point under arrest, no longer a co-conspirator and a Special Agent of the Government) that he, Tommy, is working as a confederate of Cioffi.

The said statement of Tommy is violative of the Hearsay Rule but is admissible only as an act or statement made in furtherance of a conspiracy and therefore authorized as part of the general scheme or plan.

The said statement, while admissible, subject to connection, has binding force only, if and when Cioffi is established to be part of the conspiracy.

It is urged herein that defendant, Cioffi, has never been connected with the conspiracy in the indictment as charged because that conspiracy has been abandoned by the Prosecution herein.

In addition, the conspiracy charged in the Indictment was not the conspiracy charged to the jury.

In addition, if the statement of Tommy was binding upon Cioffi, based upon a conspiracy between Tommy and Cioffi, such a conspiracy is not before the Court, there having been no presentment and no indictment by a Grand Jury as to the same.

Further, and in addition to all of the above, the aforesaid Tommy could not by his own declaration make Cioffi a part of any conspiracy unless it was established that the said statement was authorized by Cioffi and formed a part of a plan or scheme, but the same, however, must remain academic herein for the reason that, even if such a scheme

existed, it is not the subject of the Indictment herein.

That all of the aforementioned contentions apply with equal force and effect as to the statements and conversations had between Jackson and Guido (p. 161) of the Minutes relative to the sum of $200. which Jackson claimed Cioffi owed him.

It must be remembered, however, that these statements were not objectionable at the time because of the conspiracy counts in the indictment and for that reason alone were admissible.

It must therefore be remembered that all of the aforesaid statements maintain their hearsay character as to the 2nd or substantive count in the Indictment and, as to that Count, they clearly should have been excluded.

That if the Court had not charged the Jury along a conspiracy or an alleged conspiracy Count, this matter would have been clearly focused upon the Court with respect to a direction to the Jury to disregard the aforesaid statements as to the 2nd Count.

It needs no argument to establish that the same were prejudicial.

POINT V

It was error on the part of the Court to preclude examination in full as to the events, including conversations which transpired at the home of Cioffi and in his presence on June 9, 1956 at 11:30 P.M. at or about the time of his arrest.

The Agents, present in Cioffi's home on June 9, 1956 at or about 11:30 P.M. (the specific moment of arrest for purposes of this point is immaterial) are in the process of rummaging and searching through the home, when they discover the $50. bill which conforms to a serial number on a list in their possession.

The defendant, Cioffi, is questioned about the same by the Agents in the presence of the Agents, Cioffi, Cioffi's wife and Cioffi's mother-in-law.

The defendant, Cioffi, states that he procured the said bill from Guido Moscatelli in return for a $50. loan to Jackson for rent.

The Agents, seeking to disprove this statement, bring Moscatelli to Cioffi's home to confront Cioffi with the lie (as they think) but the result apparently turns out unfavorable to the Government.

When the Government Agents take the stand they are given complete latitude to describe events and conversations in the household at said time.

The examinations in substance and in effect are as follows:

What did you say to Cioffi?

What did he say to you?

What did you say to Cioffi's wife?

What did she do, or say to you, in response?

It is obvious that the Government opened the door to this line of examination, seeking to gather admissions, mistakes, inconsistencies, lies, etc., from the defendant Cioffi to be eventually used by the Government.

Counsel for the defendant at page 545 of the Minutes (Vol. 11) sought to establish through Carmella Cioffi, his wife, the entire situation, including conversations back and forth between Cioffi and Guido Moscatelli in the presence of the Agents.

The Court precluded this examination upon the ground that the statements of Moscatelli would be Hearsay.

It is urged herein that the Government opened the door and was agreeable to accept the explanations and statements of Cioffi (out of Court and Hearsay) so long as they thought they would be damaging to the said Cioffi.

It is submitted that having opened the door to the conversation, the entire conversation should come in or none at all.

POINT VI

The spectacle of permitting Jackson to take the stand, an alleged confederate and an alleged co-conspirator, and declare in the presence of the jury that he had conceded his guilt to the allegation in the indictment which charged that he and Cioffi plotted and conspired and agreed to sell and transport drugs, and, in the presence of the jury being ordered to answer and to testify, and in the presence of the jury being confronted with further punishment for refusal to testify was prejudicial to the defendant, Cioffi.

In the case at bar, Cioffi, an alleged co-conspirator by his plea of Not Guilty, denied that there was any conspiracy.

A co-defendant was thereupon brought in who declared in effect that he had heretofore declared that there was such a conspiracy.

In effect, Cioffi, was being branded and castigated by his co-conspirator's Plea of Guilty.

If Jackson was ordered by the Court to testify, and Cioffi fails to take the stand, what is left in the minds of the jurors as to the presumption of innocence.

In view of all of the aforementioned, the prejudicial effect upon defendant Cioffi as well as his failure to take the stand was devastating. (This error could not be cured by an attempted corrective charge.)

So far as this jury was concerned, Jackson was a co-defendant in an alleged conspiracy in which he and the defendant on trial was alleged co-conspirators.

So far as the jury were concerned, Jackson was not on trial—for reasons not divulged to the jury.

Even if (as was the fact) Jackson had pleaded guilty—such a plea was in the nature of a confession or admission on the part of Jackson and as such hearsay binding on Jackson alone.

Jackson, not being on trial, this revelation to the jury was prejudicial to the defendant on trial and with the damage having been done no amount of instruction to the jury could have removed its prejudicial effect.

In the eyes of the jury, a co-defendant and an alleged co-conspirator was not only called upon to testify but was placed in a position where he was refusing to testify. (Inferentially, the jury could not think otherwise than that all defendants were obliged to take the stand and to explain and defend.)

This would imply that every co-defendant would likewise have an obligation to testify and in failing to take the stand, was refusing to testify.

In placing Jackson on the stand, the jury was apprised that a co-conspirator pleaded guilty to the allegations in the indictment which were to the effect that he and Cioffii did conspire to commit the crimes alleged and that he and Cioffii did commit the crimes as alleged.

All of this was admitting a confession by a co-defendant after arrest and after the alleged conspiracy had terminated.

The admission of the evidence was prejudicial to the extent that the defendant on trial could not possibly have eradicated the effect.

In addition to this, the Court directed the said Jackson, a co-defendant on trial, to answer.

In response to a question by the Court, the said Jackson revealed that he had pleaded guilty.

The issue on trial was not how Jackson was being incriminated, but rather the effect of this display upon Cioffi. There was a Motion for a Mistrial on behalf of defendant which was denied and an exception was properly taken.

The Court then declared that it would not hold Jackson in contempt for refusing to answer.

In failing to take the stand what other effect could this have had on the jury.

If a co-defendant could be ordered to answer and could be held for contempt for his refusal—what could the jury possibly have thought of Cioffi in his failure to take the stand.

POINT VII

The sale, concealment, receiving and facilitating the transportation and sale of a narcotic drug contemplated by the statute (Sec. 174, Title 21, U.S.C.A.) in accordance with its true intent and construction declared criminal the sale, transportation or facilitating as part of a criminal business or enterprise having a degree of continuity and yielding a financial return of substance as distinguished from the casual or isolated acts of an intermediary or acts of procurement, such as existed in the case at bar.

The above principle can find its best support in the cases cited herein.

In the case of *U. S.* v. *Sawyer*, 210 Fed. (2d) 169, the appellant was convicted by a jury under an indictment charging the unlawful sale of a quantity of heroin.

The purchaser was a Federal Narcotics Agent.

The appellant claimed as error that the Court erred in denying a defense request that the Court explain to the jury the difference in fact and in law between dealing with a purchaser as a seller and acting for the purchaser as a procuring agent.

The Court held that the lower Court should have pointed out to the jury that if they believed defendant and that the defendant undertook to act in purchaser's behalf rather than this own, and bought drugs from a 3rd person with whom he was not associated in selling, the defendant would not be a seller and could not be convicted under this indictment (p. 170).

Held further, the defense of entrapment should have been submitted to the jury (*Sorrells* v. *U. S.*, 287 U. S. 435, 445).

> "When the criminal design originates not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by social public policy from prosecution therefor".

It was held that the issue which should have been presented to the jury was whether the defendant's course of conduct and activity was such that he was disposed to trade in narcotics or whether he yielded to the importunities of the occasion. Judgment of Conviction reversed.

See also:

U. S. v. *Marie Moses*, 220 Fed. (2d) 166 (1955).

POINT VIII

The failure on the part of the Court to charge and to define for the jury that the sale, concealment, etc., of a narcotic drug contemplated by the statute (Secs. 173-174, Title 21, U. S. Code) declared criminal the sale, etc., as part of a business or as part of an enterprise having some degree of continuity or yielding a return, stake or financial interest, as distinguished from the casual or isolated acts of an intermediary, constituted reversible error.

The above principle has been enunciated in the following cases interpreting and construing the Statute:

United States v. *Sawyer*, 210 Fed. (2d) 169;

U. S. v. *Moses*, 220 Fed. (2d) 166;
Adams v. *U. S.*, 220 Fed. (2d) 297.

See also:

U. S. v. *Falcone*, 109 Fed. (2d) 579;
Direct Sales v. *U. S.*, 319 U. S. 703;
U. S. v. *Peoni*, 100 Fed. (2d) 401;
U. S. v. *Tramaglino*, 197 Fed. (2d) 928 at 930;
U. S. v. *Becker*, 62 Fed. (2d) 1007.

The within point as well as the judicial authorities cited herein were urged upon the Court so that the jury would be properly instructed as to the connotation and meaning of the Statute with respect to what constitutes a sale and that it must have connected with it more than a recommendation and more than a person acting as a mere intermediary and that it must be established that the person charged had a stake, an association, a relationship or an interest in the outcome.

In the face of all of the aforementioned well considered judicial erudition, the charge which the jury received pertaining to the subject herein was as follows at pages 736-737 (Vol. IV):

> "And I would point out to you that if the defendant merely acted as a person who said, 'You can get the drug somewhere else' that is not sufficient for a conviction".

The aforementioned sparse and succinct charge relative to the construction and interpretation of Sections 173 and 174, Title 21, U. S. Code, as to what constitutes a sale within the intendment of the Statute, may constitute a real milestone in our legal jurisprudence, but it seems to the writer

that it was tantamount to a direction of a verdict by the Court on a specific issue of fact, to wit, that the evidence elicited in the case at bar was sufficient as a matter of law to constitute the crime charged within the meaning of the Statute.

It is submitted that it was error not to submit the said question to the jury under proper instructions as to the meaning and intent of the Statute and what degree of proof was essential to be found in order to reach the conclusion that there was a sale and that the said sale was of a character condemned by Statute.

POINT IX

The Trial Court in its charge to the jury submitted and defined for their consideration and determination a crime which was not the subject of the indictment and a crime which was not before the Court, thus rendering a trial thereon void.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT X

The Trial Court charged the jury for their consideration and determination a new and different conspiracy embracing different dates and new and different parties as well as new and different overt acts, not at all as contained and as charged in the indictment.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XI

The Trial Court by its charge permitted the jury to make findings, pass upon and determine and render judgment upon a new and different conspiracy charged by the Court but not at all contained in the Indictment and not at all the subject of an Indictment by a Grand Jury.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XII

The Trial Court by its charge permitted the jury to find and to render a determination with respect to either one of two conspiracies (one self-created by the Court) as if the proof as to either one would be sufficient to satisfy the allegations in the indictment, when in fact the self-created conspiracy charged was not a part of the Indictment at all.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XIII

The conduct of the Court, in varying the charge in the middle of the case, as if the said varied charge constituted the crime or conspiracy charged in the Indictment, cannot be declared harmless error.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XIV

The case at bar falls within the permissible zone of secondary or smaller conspiracies fitting within the pattern of the larger or broader conspiracy as properly charged *(Berger* v. *U. S., infra),* or the case at bar fits more properly within the principles enunciated in the case of *U. S.* v. *Kotteakos, infra,* as constituting separate conspiracies, one of which is not at all charged in the indictment, and is improperly charged by the Trial Court to the jury and as such is the subject of condemnation by the said *Kotteakos* case.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XV

The practice in the case at bar of permitting an alleged co-conspirator to subsist throughout the indictment and throughout the trial in the dual phase of both a conspirator and a Government Agent concurrently constituted prejudicial error to the defendant, Cioffi.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XVI

The principles as enunciated in *Berger* v. *U. S.*, 295 U. S. 8; *Teleman* v. *U. S.*, 67 Fed. (2d) 716 and *Kotteakos* v. *U. S.*, 328 U. S. 750 in the light of the Harmless Error Statute require further and more explicit clarification by this Court for the general benefit and guidance of the bench and bar as well as the guidance of prosecuting officers as to the preparation of indictments.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XVII

The clear and explicit pronouncements as set forth in *Ex Parte Bain*, 121 U. S. 1 as to the redrafting and variance of Indictments by the Court and prosecuting officers in violation of Amendment V of the U. S. Constitution have been entirely swept away and rendered obsolete in our present day law as to conspiracy in the light of the Harmless Error Statute.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XVIII

The practice on the part of the Government in the case at bar of calling a co-defendant and alleged co-conspirator as a witness for the Government after the said co-defendant has pleaded guilty to the Indictment for the specific purpose of parading said fact to the jury, the Government knowing and having been informed that the said co-defendant has and will refuse to testify, constitutes prejudicial error of a nature requiring reversal.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

POINT XIX

The said prejudicial effect of disclosing to the jury the said co-defendant's theretofore plea of guilty applies with equal force and effect as to all of the counts in the Indictment with respect to the defendant, Cioffi.

(Heretofore sufficiently treated and explained herein as well as in Petitioner's Briefs being submitted herewith.)

That your petitioner is submitting herewith as an auxiliary aid in connection with the Petition herein, copies of your petitioner's briefs heretofore submitted in the United States Court of Appeals, Second Circuit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH CIOFFI, *Pro se*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

UNITED STATES OF AMERICA,

—against—

JOSEPH CIOFFI,

Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JOSEPH CIOFFI, being duly sworn, deposes and says that he is the Petitioner in the within action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters be believes it to be true.

JOSEPH CIOFFI

Sworn to before me this
3rd day of April, 1957.

HUGH V. WATSON
NOTARY PUBLIC, State of New York
No. 31-9550600
Qualified in New York County
Commission Expires March 30, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

UNITED STATES OF AMERICA,

—against—

JOSEPH CIOFFI,

Petitioner.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES J. HANRAHAN, Esq., being duly sworn, deposes and says that he is the attorney for the Petitioner in the within action; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JAMES J. HANRAHAN

Sworn to before me this
30 day of April, 1957.

HUGH V. WATSON
NOTARY PUBLIC, State of New York
No. 31 - 9550600
Qualified in New York County
Commission Expires March 30, 1958

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 249—October Term, 1956.

(Argued February 5, 1957 Decided April 1, 1957.)

Docket No. 24428

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOSEPH CIOFFI,

Defendant-Appellant.

Before:

CLARK, *Chief Judge,*
MEDINA, *Circuit Judge,* and SMITH, *District Judge.*

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, *Judge.*

Joseph Cioffi appeals from his conviction on verdict of a jury on two counts, one for dealing in narcotics and the other for conspiring to violate the narcotic laws. Affirmed.

JAMES J. HANRAHAN, New York City, *for defendant-appellant.*

GEORGE C. MANTZOROS, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

Appendix A

CLARK, *Chief Judge*:

This is an appeal from a judgment of conviction after verdict of a jury for dealing in narcotics and conspiring to violate the narcotic laws. The principal claims on appeal concern an alleged variance between the indictment and the proof submitted to the jury; an asserted error in the charge; and a failure to declare a mistrial because a co-conspirator and prosecution witness, in answer to a question by the court, stated that he had pleaded guilty.

The single appellant, Cioffi, was indicted, together with Moscatelli and Jackson, in a three-count indictment alleging (1) that Cioffi and Jackson dealt in narcotics on May 5, 1956; (2) that Cioffi and Moscatelli committed a similar offense June 9, 1956; and (3) that the three men "and others to the Grand Jury unknown" conspired to violate various federal narcotics laws from May 5, 1956, until the date the indictment was filed, June 27, 1956. The other defendants having pleaded guilty, only Cioffi stood trial. The first count was dismissed; he was found guilty and sentenced to $1,000 fine and four years' imprisonment on the second count; on the third count he was found guilty and given a four-year sentence, to run concurrently.

1. *The Facts.* Two separate sales of heroin were proved, on May 5 and on June 8. On the case for the prosecution Jackson was a leading figure in obtaining the heroin on May 5, the purchaser being a government agent. When told by the agent that heroin was wanted, Jackson made a telephone call to La Pupps Bar. After making the call Jackson told the would-be purchaser when to meet him and how much money to bring. The purchaser was taken by

Jackson to La Pupps, where Cioffi greeted Jackson and called him into the rear of the bar. A few minutes later Jackson reappeared, joined the agent, and took him to a near-by building where Jackson obtained a package containing heroin which he gave to the agent.

On June 8-9 Jackson, recently arrested, was again instrumental in obtaining heroin for a government agent pretending to be a purchaser. Jackson again called La Pupps and spoke to Cioffi, who told him to come to the bar the next day. When Jackson complied he was greeted by Cioffi, who led him into an adjoining dining room. Jackson was seen by the government agent to be seated in the dining room with Moscatelli, who was heard to tell Jackson that everything would be the same as before and that he, Moscatelli, was handling things for Cioffi. Moscatelli asked Jackson if he had the money, and Jackson handed over $1,500 in marked bills. Then Moscatelli instructed Jackson to go to a near-by building at 11:00 that evening.

During the conversation Jackson requested Moscatelli to ask Cioffi for $50 so that he could pay the rent. Moscatelli offered $50 from the roll of marked money, but Jackson advised him to leave that money intact and get the $50 from Cioffi. At that point the telephone rang. Moscatelli answered it and then went to the doorway and called Cioffi. As Moscatelli and Cioffi met in the doorway the roll of $1,500 changed hands and Cioffi answered the phone.

After the phone call Moscatelli and Cioffi walked into the barroom, and when Moscatelli returned a few minutes later he gave some money to Jackson. At 11:00 that evening the government agent and Jackson went to the designated building where they met Moscatelli, who told them where the heroin was hidden in a package under a radiator.

When the agent returned from the building with the heroin Moscatelli and Jackson were arguing about $200 Jackson claimed Moscatelli and Cioffi owed him for getting the customer. Moscatelli replied that he should not worry about his money; Cioffi was not at the bar, but the money would be left there Sunday.

Later, when Cioffi was arrested, the arresting officers found in his wallet a bill identified as one of the marked roll handed to Moscatelli by Jackson.

2. *Variance.* Upon the facts just stated the sole proof that Moscatelli was a member of the conspiracy prior to June 8 is his statement, overheard by a government agent, that everything would be the same as before and that he was handling things for Cioffi. This could mean either that he had handled things before or that he was a recent addition to the conspiracy. Under the circumstances this was too slim a reed on which to pin a finding that the conspiracy included Moscatelli prior to June 8, but it does support a finding that Moscatelli was aware of the prior business operations of the conspiracy which he joined. It is clear that Jackson was arrested and left the conspiracy before the date when Moscatelli was shown to have joined it. Consequently there is no date on which the evidence is sufficiently substantial to show that all three men were simultaneously conspirators.

The jury could have found, however, that Cioffi and persons unknown were peddling heroin at La Pupps Bar on May 5 and June 9; that Jackson was part of the business operation until his arrest; and that Moscatelli was part of the same operation immediately after Jackson's arrest with

knowledge of the prior dealings of the conspiracy. Note, *Federal Treatment of Multiple Conspiracies*, 57 Col. L. Rev. 387, 388-393 (1957). While some personnel changed, it continued to be the same conspiracy engaged in the same trade at the same stand in the same way. The variance thus consists of the fact that Moscatelli was not proved to be in the conspiracy until the day after Jackson dropped out. There is no claim in the appellant's brief that this slight variance prejudiced him in the preparation of his case or at trial. The trial judge was careful to charge that Jackson's post-arrest statements were not proof against the defendant and there were no statements made by Moscatelli before June 8. The jury did not receive evidence that would have been inadmissible under a more accurate indictment, nor was the defendant tried for participation in a conspiracy different from the one charged in the indictment. Where the discrepancy does not prejudice the defendant the variance is not grounds for reversal. Compare the facts in *Berger* v. *United States*, 295 U. S. 78; *Kotteakos* v. *United States*, 328 U. S. 750.

3. *The Court's Charge.* Defendant also claims that the judge's charge allowed the jury to convict on the conspiracy count if it found "(1) that there was a conspiracy between Cioffi and Moscatelli to commit an offense against the United States; (2) that the defendant Cioffi knowingly associated himself with this conspiracy; and (3) that either Cioffi or Moscatelli, while a party to the conspiracy, committed an overt act in furtherance of the conspiracy." This passage occurred after other passages admonishing the jurors that "[t]he case must be decided within the scope of the charges made against the defendant as con-

tained in the indictment" and after the judge read the whole conspiracy count of the indictment to the jury and summarized it as charging that "from the 5th of May, 1956, up to the filing of the indictment, the defendant Cioffi, together with Guido Moscatelli and Charles Jackson, combined and conspired to violate laws relating to the sale of narcotics." While it is conceivable that some jurors ignored one part of the judge's charge and concentrated solely on the other part, there was no objection raised by defense counsel to the charge; and consequently the defendant may not assign it as error. F. R. Cr. P., rule 30.

4. *Testimony as to Guilt of a Coconspirator.* Charles Jackson, the coconspirator who acted as a government agent after his arrest, pleaded guilty to counts one and three of the indictment before Cioffi's trial and was called by the Government as a witness. He gave his name and address, but announced to the trial judge that he refused to testify further on grounds of self-crimination. When the prosecuting attorney was given permission by the trial judge to ask the witness a few questions the following exchange occurred:

> "Q. Mr. Jackson, this is the trial of Joseph Cioffi on an indictment naming Joseph Cioffi, Guido Moscatelli and Charles Jackson for violation of the federal narcotics laws on May 5, 1956 and June 9, 1956.
>
> "Are you the Charles Jackson named as a defendant in that indictment?
>
> "The Court: I direct that you answer.
>
> "The Witness: My name is Charles Jackson, sure.

"Q. Are you the Charles Jackson named in the indictment? A. I suppose so.

"Q. On May 5, 1956 did you meet with your brother Richard and a person who was introduced to you as Joe from St. Louis? A. I refuse to answer that question.

"The Court: On the ground that it might incriminate you?

"The Witness: Right.

"The Court: Are you still pending trial on this indictment?

"The Witness: No, sir. I have pleaded guilty and got ten years.

"The Court: Then how can it incriminate you if you testify now?

"The Witness: Because I don't feel justified in testifying.

"Mr. Hanrahan: Your Honor, at this time I am asking for the withdrawal of a juror and a mistrial here, in view of the prejudicial question asked by your Honor at this moment.

"The Court: I deny your motion.

"Mr. Hanrahan: I take exception.

"The Court: Whether this man pleaded guilty is no evidence as to whether Mr. Cioffi is guilty. This man was accused as a defendant. He pleaded guilty. That is no evidence that Mr. Cioffi is guilty. He is a separate defendant in this case, and the jury will not consider that the guilt of one defendant is necessarily any proof of another defendant's guilt in a case, obviously."

The trial judge was not in error in allowing the prosecution to ask whether the witness was still pending trial on the indictment. No objection had been raised to the question. It is now claimed that it was error to deny a new

trial after the answer came out. Whether or not to declare a mistrial is in the discretion of the lower court judge, who is in the best position to gauge the need for it. *United States* v. *Giallo,* 2 Cir., 206 F. 2d 207, 210, affirmed *Giallo* v. *United States,* 346 U. S. 929. Here the jury did not know whether the witness had pleaded guilty to the first count of the indictment, which was dismissed against Cioffi, or whether he also pleaded guilty to the conspiracy count. The trial judge promptly admonished the jurors to disregard the witness' response, and the same instruction was included in the final charge to the jury. *United States* v. *Falcone,* 2 Cir., 109 F. 2d 579, affirmed 311 U. S. 205; *United States* v. *Pagano,* 2 Cir., 224 F. 2d 682, certiorari denied 350 U. S. 884.

Nor was it error to allow the Government to call Charles Jackson as a witness. Inasmuch as Jackson had already pleaded guilty to the indictment he had no obvious reason for invoking the privilege against self-crimination, and there is no showing that the United States Attorney expected him to invoke the privilege on the stand. See *United States* v. *Hise,* 2 Cir., 185 F. 2d 822, 831, 832, certiorari denied 340 U. S. 948. The trial judge was also correct in allowing the Government to question the witness as to whether the proceedings against him under this indictment had been terminated, for that fact was crucial in deciding whether or not Jackson could invoke the privilege not to give testimony.

We have examined the other allegations of error and find them all without substance.

Affirmed.

In the Supreme Court of the United States

October Term, 1956

No. 957

JOSEPH CIOFFI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 61-68) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1957. The petition for a writ of certiorari was filed May 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Since the substantive count on which petitioner received the heaviest sentence supports the judgment, the only questions which respondent believes properly in the case are:

1. Whether, on a charge of selling narcotics, there must be proof of a business enterprise with a degree of continuity.

2. Whether statements by a co-defendant in furtherance of the criminal enterprise were properly admitted against petitioner.

3. Whether the fact that a co-defendant (not named in the substantive count on which petitioner was convicted) was questioned after he had claimed the privilege against self-incrimination and revealed the fact that he had pleaded guilty was prejudicial to petitioner, where the trial judge specifically instructed the jury that such fact had no bearing on petitioner's guilt, and the judge dismissed the substantive count in which the co-defendant was named.

4. Whether the judge, rather than a jury, determines disputed issues of fact on a motion to suppress.

5. Whether the trial judge properly excluded as hearsay certain evidence offered by the defense.

The petition for a writ of certiorari also sets forth a number of questions relating to the conspiracy count which together present the following issue:—

6. Whether under a conspiracy count charging a conspiracy between three persons from May 5 to June 27, 1956, it was a fatal variance for the judge to permit the jury to make a finding of guilt on the basis of a conspiracy between two persons after June 8.

STATEMENT

An indictment in three counts was returned against petitioner in the United States District Court for the Southern District of New York charging (1) that petitioner and one Jackson sold, concealed, and transported narcotics on May 5, 1956; (2) that petitioner and one Moscatelli committed a similar offense on June 9, 1956; and (3) that the three men and others to the grand jury unknown conspired to violate the narcotics laws between May 5, 1956, and June 27, 1956 (R. I, 7-10).

Petitioner alone was tried. The evidence at the trial may be summarized as follows:

On May 5, 1956, a government agent sought to purchase narcotics from Charles Jackson (R. II, 2a-3a). He was directed to return later (R. II, 6a). About 4:30, the agent gave Jackson $1,500 and was told to return at nine o'clock (R. II, 7a). Jackson took the agent to La Pupps Bar, where petitioner greeted Jackson and called him to the rear of the bar (R. II, 9a). A short time later, Jackson took the agent to a nearby building where he obtained a package which he gave to the agent (R. II, 10a).

Jackson was arrested on June 8, and agreed to act as an informer for the government. On June 8, Jackson called petitioner at La Pupps Bar with a government agent standing beside him at the telephone. The agent identified the voice at the other end of the telephone as petitioner's (R. II, 16a-19a). Jackson told petitioner he wanted "ten to go West" and

petitioner told him to come to the bar the next day (R. II, 19a).

The next day, June 9, Jackson and a government agent went to La Pupps Bar (R. II, 20a). Jackson had been given $1,500 in marked bills which were in a roll folded once and secured by an elastic band (R. II, 20a, 37a). Petitioner greeted Jackson and took him to an adjoining room (R. II, 21a, 30a). When the agent joined them, Jackson was seated at a table with Moscatelli who said he was handling things for petitioner and everything would be the same as before (R. I, 11-12; II, 21a). Jackson gave Moscatelli the $1,500 and Moscatelli told the two men to be at a certain address at 11 p.m. (R. II, 21a-22a). Jackson told Moscatelli to ask petitioner for $50 so that he could pay his rent but, when Moscatelli offered Jackson $50 from the roll just given him, Jackson said to leave that intact (R. II, 22a).

At that point, Moscatelli answered the telephone and called petitioner. As he and petitioner met in the doorway, Moscatelli was seen to hand petitioner a roll of money secured by an elastic band (R. II, 22a-23a, 30a-31a). A few minutes later, Moscatelli returned and handed Jackson some money (R. II, 23a).

At 11 p.m., Jackson and the agent went to the previously specified address. Moscatelli, who was standing on the steps of a house, pointed to a doorway directly across the street and said the "stuff" was under a radiator on the right in the hall of that building (R. II, 23a). The agent, as directed, found

a long brown paper-wrapped package (R. II, 23a-25a).[1]

Petitioner was thereafter arrested at his home on June 9, 1956 (R. II, 38a, 40a). In a billfold on his person was a $50 bill which was part of the marked money (R. II, 41a).

Jackson was called as a witness by the government and refused to testify on the ground that his testimony might incriminate him. When asked by the court whether he was still pending trial on the indictment, he said he had pleaded guilty and received a sentence of ten years. The court immediately instructed the jury that such fact was no evidence that petitioner was guilty (R. I, 16). Thereafter, the United States Attorney was permitted to ask Jackson some questions as to the events on May 5, but Jackson persisted in his refusal to answer. The court then ruled that the only action it could take would be a contempt proceeding, that this would be useless in view of the time Jackson already had to serve, and that there was no point in further examination of the witness (R. I, 16-19).

The court found that the evidence as to May 5 was insufficient to warrant petitioner's conviction and so instructed the jury (R. I, 20, 24). It also again instructed the jury that Jackson's plea had no bearing on petitioner's guilt (R. I, 28).

On the conspiracy count, the judge pointed out that, after Jackson was arrested on June 8, he no longer

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[1] It is not disputed that the package was shown to contain heroin.

was a party to the conspiracy and his statements could not be used in determining whether there was a conspiracy or whether petitioner was a party thereto (R. I, 30-31). After summarizing the general conspiracy charge, the judge called the attention of the jury only to that overt act which related to June 9, 1956 (R. I, 32). He said, "In judging whether or not there was an unlawful agreement to commit an offense against the United States, you may judge the acts and conduct of the alleged co-conspirators, in this case particularly Cioffi and Moscatelli" (R. I, 32). Then throughout his charge on the elements of conspiracy he referred only to petitioner and Moscatelli (R. I, 32-35).

On the substantive count relating to the events on June 9, in which petitioner and Moscatelli were named as defendants, the court charged (R. I, 25):

> * * * if the defendant merely acted as a person who said "You can get the drug somewhere else," that is not sufficient for a conviction. It must be a participation in the transportation, concealment and sale of a narcotic drug.

He pointed out that no one saw petitioner handle narcotics, that the evidence against him was circumstantial, and that a conviction should be based on circumstantial evidence only if the jury found that "the circumstances are such that they can lead to no other conclusion but that the defendant was guilty beyond a reasonable doubt" (R. I, 29).

The jury found petitioner guilty on both counts (R. I, 43). Petitioner was sentenced to four years and a $1,000 fine on the substantive count, and four

years on the conspiracy count, to run concurrently with the prison term on the substantive count (R. I, 44-45). On appeal, the judgment was affirmed.

ARGUMENT

Since the prison sentences on both counts are to run concurrently, and since the fine was imposed only on the substantive count, that count alone supports the judgment. For this reason, a large part of the petition for a writ of certiorari, which relates to the conspiracy count, attempts to raise issues which are not really in the case.

1. On the substantive count, petitioner, relying upon cases which have held that one who merely acts as agent for the purchaser in obtaining narcotics without profit to himself cannot be deemed a seller, argues that the judge should have instructed the jury that he could be guilty only if the sale was part of a criminal business having some degree of continuity (Pet. 51-54). Regardless of the validity of the cases on which petitioner relies, they have no bearing here, where petitioner could have been found guilty only on the theory that he sold for profit. In fact, the judge specifically charged, as noted *supra*, that, in order to convict, the jury had to find "participation" in the transportation, concealment, and sale of a narcotic drug (R. I, 25). A single sale is clearly an offense under the statute. Cf. *Blockburger* v. *United States*, 284 U.S. 299.

2. Although, as noted above, the conspiracy count is not really in the case, petitioner argues that, without that count, the conversation by Moscatelli with

Jackson—in which Moscatelli said he was acting for petitioner and made arrangements for delivery of narcotics on June 9—would not have been admissible against petitioner (Pet. 43-45). However, where defendants are engaged in a joint enterprise, they are, without a conspiracy count, treated as co-conspirators so that the acts and statements of one in furtherance of the joint enterprise are admissible against all. *Wiborg* v. *United States*, 163 U.S. 632, 657; *Garber* v. *United States*, 145 F. 2d 966, 969 (C.A. 6). Hence, the evidence as to Moscatelli's statement, which was not mentioned by the judge in his summary of the evidence on the substantive count (R. I, 26), could have been admitted to prove that count on exactly the same terms as it was admitted on the conspiracy count. With relation to the conspiracy count, the judge charged the jury that, before any statement by Moscatelli was to be considered against petitioner, the jury must first conclude, from evidence of the petitioner's own actions, that he was in a conspiracy with Moscatelli (R. I, 33). He also pointed out that, even then, the jury need not conclude that Moscatelli was necessarily telling the truth (R. I, 34-35).

The fact that the statements were made to Jackson is not significant. They were statements not by Jackson but by Moscatelli, a member of the criminal enterprise. Statements by Moscatelli to any third person in furtherance of the criminal enterprise would have been admissible against petitioner, under the cases cited.

3. As set forth in the Statement, *supra*, the trial judge dismissed against petitioner the substantive count relating to the sale by Jackson on May 5, and in effect limited consideration of the conspiracy count to a conspiracy with Moscatelli after June 8, charging that Jackson was not a conspirator after that date. Under these circumstances, the questioning of Jackson about the events of May 5, after he had claimed the privilege, could not have been prejudicial to petitioner (see Pet. 48-50). The judge not only told the jury that Jackson's plea had no bearing on petitioner's guilt, but also told the jury it had dismissed the count relating to May 5 (in which Jackson was named as a co-defendant), thus emphasizing the separate nature of the guilt of each defendant. Jackson was not named in the substantive count on which this judgment must rest.

As the court below held, the government was clearly justified in calling Jackson in view of his plea of guilty and the fact that his case had been concluded. Only four questions relating to May 5, and that repetitive of testimony given by the agents (see R. II, 2a-4a, 28a-29a), were asked before the judge directed that the witness be excused (R. I, 16-19).

4. Petitioner made a motion to suppress, but the testimony at the hearing has not been printed or filed in this Court. According to petitioner's brief in the Court of Appeals, filed in this Court (C.A. Br. 13-15), the government agent testified as he did at the trial (see R. II, 38a-42a) that after 11 o'clock on June 9, (*i.e.*, after the sale by Moscatelli had been completed), he went to petitioner's apartment, arrested petitioner

and found the $50 bill in the wallet on petitioner's person. Petitioner, his wife, and mother-in-law testified that the agents never said that petitioner was under arrest, searched the entire apartment, and then finally asked petitioner if he had money on his person. After petitioner produced the bill, he told the agents that the money had been given him by Moscatelli, and the agents brought in Moscatelli in handcuffs. At no time did the agents tell petitioner he was under arrest.

The judge believed the agent's testimony and held the evidence admissible as obtained pursuant to a valid search incident to arrest. Petitioner argues that the issues of credibility presented by the conflicting evidence should have been submitted to the jury (Pet. 34-43). The admissibility of evidence alleged to have been obtained by an illegal search has, however, from the time the rule of suppression was established, been a matter of law to be determined by the court. In fact, Rule 41(e) requires that, unless special circumstances are shown, the motion must be made before trial.

5. At the trial, petitioner attempted to explain his possession of the marked $50 bill by calling witnesses who testified that they saw Moscatelli ask petitioner for money and that about twenty minutes later Moscatelli gave petitioner a $50 bill which he said was in payment of the loan (see R. I, 27; C.A. Br. 15-16). Petitioner's wife apparently testified that at the time petitioner was arrested he told agents he obtained the $50 bill from Moscatelli and then the agents brought Moscatelli to the house (see

C.A. Br. 16-17). When she was asked as to what Moscatelli said about the $50 bill, the judge excluded the testimony as hearsay (R. II, 44a-48a). The judge pointed out that Moscatelli was available as a witness (R. II, 47a).

It is evident that petitioner was offering his wife's testimony as to what Moscatelli had said as proof of his defense that Moscatelli had given him the $50 bill in repayment of the loan. The court properly ruled that, for such purpose, the testimony was hearsay.

6. While the issue to which a large part of the petition is devoted—the alleged variance between the conspiracy count charge in the indictment and the theory on which the case was submitted to the jury (Pet. 13-34)—need not be reached, petitioner's contention is without merit. We agree with petitioner that, read as a whole, the judge's charge is properly interpreted as submitting to the jury only a conspiracy between petitioner and Moscatelli existing after June 8, *i.e.*, after Jackson had been arrested (see the Statement, *supra*). The indictment charged a conspiracy among the three from May 5 to the return of the indictment, but listed separate overt acts on May 5 and June 9. What the judge actually did, therefore, was submit to the jury an issue as to a conspiracy narrower than, but clearly covered by, the conspiracy charged in the indictment. This is not a fatal variance. Cf. *Ford* v. *United States*, 273 U.S. 593, 602.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1957.

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